

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

PATRICK A. FOX, JR.,

Petitioner,

v.

GREG SMITH, et al.,

Respondents.

Case No. 3:12-cv-00335-MMD-WGC

ORDER

Petitioner has submitted an amended petition (dkt. no. 10). The Court has reviewed it pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts. The Court will direct respondents to submit a response.

The Court found grounds 1 and 2 of the original petition (dkt. no. 7) to be defective because the Fourth Amendment violations that he alleged in those grounds pre-dated petitioner's guilty plea. The plea normally is a break in the proceedings that does not permit a petitioner to raise independent constitutional claims that pre-date the plea. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973). The Court gave petitioner the opportunity to allege that he had entered a conditional guilty plea pursuant to Nev. Rev. Stat. § 174.035(3), which would let him raise the Fourth Amendment violations on direct appeal. In the amended petition, petitioner alleges in grounds 1 and 2 that the plea was conditional. The allegation is not entirely plausible. A counsel who had negotiated a conditional plea to raise an issue on direct appeal likely would appeal the judgment, but petitioner claims in ground 3 that counsel did not file a direct appeal. Nonetheless,

1 counsel might have been that ineffective. The Court will accept petitioner's allegations
2 as true for the purposes of this order.¹

3 The Court found ground 3 of the original petition (dkt. no. 7) to be defective
4 because it was unclear whether petitioner was presenting four issues or was arguing
5 that counsel should have raised those issues on direct appeal. In ground 3 of the
6 amended petition (dkt. no. 10), petitioner corrects that defect by alleging that he told
7 counsel to appeal the judgment of conviction and that he wanted counsel to raise four
8 issues on direct appeal. One of the issues that petitioner wanted raised on direct
9 appeal was ineffective assistance of counsel. In Nevada, that issue must be raised in a
10 post-conviction habeas corpus petition, not on direct appeal. *Gibbons v. State*, 634
11 P.2d 1214 (Nev. 1981). The Court cannot conclude that the other three issues are
12 without merit on the face of the petition, and respondents will need to respond to them.

13 Petitioner has re-alleged grounds 4 and 5 in the amended petition (dkt. no. 10),
14 and respondents will need to respond to them.

15 Petitioner has submitted a motion to reconsider appointment of counsel (dkt. no.
16 11). Nothing in the motion would cause the Court to depart from its decision regarding
17 petitioner's motion for appointment of counsel (dkt. no. 8).

18 IT IS THEREFORE ORDERED that petitioner's motion to reconsider
19 appointment of counsel (dkt. no. 11) is DENIED.


20 IT IS FURTHER ORDERED that respondents shall have forty-five (45) days from
21 the date on which the petition was served to answer or otherwise respond to the
22 amended petition (dkt. no. 10). If respondents file and serve an answer, then they shall
23 comply with Rule 5 of the Rules Governing Section 2254 Cases in the United States
24 District Courts, and then petitioner shall have forty-five (45) days from the date on which
25 the answer is served to file a reply.

26
27 ¹The Court makes no statement whether petitioner received a full and fair
28 opportunity to litigate the Fourth Amendment claims in state court. That opportunity
would bar this Court from considering those claims. See *Stone v. Powell*, 428 U.S. 465
(1976).

1 IT IS FURTHER ORDERED that any exhibits filed by the parties shall be filed
2 with a separate index of exhibits identifying the exhibits by number or letter. The
3 CM/ECF attachments that are filed further shall be identified by the number or numbers
4 (or letter or letters) of the exhibits in the attachment. The hard copy of any additional
5 state court record exhibits shall be forwarded — for this case — to the staff attorneys in
6 Las Vegas.

7 IT IS FURTHER ORDERED that, henceforth, petitioner shall serve upon
8 respondents or, if appearance has been entered by counsel, upon the attorney(s), a
9 copy of every pleading, motion or other document submitted for consideration by the
10 Court. Petitioner shall include with the original paper submitted for filing a certificate
11 stating the date that a true and correct copy of the document was mailed to the
12 respondents or counsel for the respondents. The Court may disregard any paper
13 received by a district judge or magistrate judge that has not been filed with the Clerk,
14 and any paper received by a district judge, magistrate judge, or the Clerk that fails to
15 include a certificate of service.

16 DATED THIS 1st day of May 2013.

17
18 
19 _____
20 MIRANDA M. DU
21 UNITED STATES DISTRICT JUDGE
22
23
24
25
26
27
28